SUPREME COURT, U. S.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 996

STERLING NATIONAL BANK OF DAVIE,
Petitioner,

vs.

WILLIAM B. CAMP, Comptroller of the Currency, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, Sterling National Bank, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 27, 1970.

OPINION BELOW

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No Opinion was rendered by the District Court for the Southern District of Florida.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on August 27, 1970. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., §1254 (1).

QUESTIONS PRESENTED

1. IS THE COMPTROLLER OF THE CURRENCY OBLIGED TO MAKE FINDINGS AND CONCLUSIONS OR, AT LEAST, A REASONED OPINION IN GRANTING OR DENYING A NATIONAL BANK CHARTER?

2. MAY THE COMPTROLLER OF THE CURRENCY ENTERTAIN AND CONSIDER SECRET, EX PARTE MATERIAL PREJUDICIAL TO ONE SIDE IN GRANTING OR DENYING A NATIONAL BANK CHARTER WITHOUT AFFORDING THE PARTY PREJUDICED A CHANCE TO REPLY?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the United States Constitution:

> "No person . . . shall be deprived of life, liberty or property without due process of law. . . . ", 5 U.S.C. §557(c).

12 U.S.C.A. §27:

> "If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter."

STATEMENT OF THE CASE

This is an action in which Sterling National Bank — a small, single bank in the sparsely settled and relatively static community of Davie, Florida (77; A-R 77)[1] sought to prevent the Citizens' National Bank, a chain bank operation (hereinafter referred to as "Citizens Chain") capable of sustaining a loser bank location, from opening a new division in competition with Sterling for the few bank customers presently available in Davie.

On May 27, 1968, the individual Defendants had filed with the Regional Administrator of National Banks for a charter for a new national bank to be known as the "Citizens National Bank of Davie". (A-R 498). The matter was first referred to Field Examiner, S. R. Pitruzzello, who made an extensive investigation report (A-R 61-72). Field Examiner Pitruzzello reported,

> "there does not appear to be a compelling justification for the proposed bank. The development of the area and the present availability of business do not warrant a new banking facility which would draw its limited business from existing institutions.
>
> • • •
>
> In the writer's opinion, there is simply no need for the proposed bank at the present time. It is recommended that this application be disapproved." (A-R 72).

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[1] "A-R" refers to Exhibit A of the Record which is the "Administrative File" prepared by the Comptroller's Office.

On August 15, 1968, the Regional Economist considered the application of the Citizens Chain and stated:

> "After reading the Summary of Information presented by the organizers of this proposed bank, I can only recommend that the application be turned down. In general, the economic information presented is weak and misleading. The best that can be said about the area is that 'it is about to experience rapid growth.' (p. 11). No substantial growth has occurred in the primary service area. Further, there is already one bank in the primary service area." (A-R 78).

On September 11 and 12, 1968, the Regional Administrator conducted a hearing on the application which produced 331 pages of transcript. After looking the witnesses in the eye for two days, the Regional Administrator found on the basis of his assessments of the evidence and the witnesses on September 27, 1968:

> "We do not agree with the investigating examiner that proposed management is acceptable. This comment is in no way a reflection upon the character or integrity of management but only to point out that the affiliates are hardly in a position to sponsor a new bank and give it much help. It is our opinion that management does not possess the talent to further expand. We further believe that management should devote their entire energies to the promoting of the three affiliated banks and should first demonstrate their ability to operate them successfully before diverting their time and efforts to promoting a new bank.
>
> * * *

> We believe that the approval of this application could adversely effect the Sterling National Bank of Davie. Admittedly, this bank has shown good deposit growth. Nevertheless, it is not considered well established, despite its size. Moreover, it is contemplating a substantial investment in fixed assets which could further defer its becoming a well established bank. There is no actual need for a bank at the proposed location, and even the convenience factor is negligible. The economic information submitted to support this application is misleading and has been slanted in an attempt to gain approval. It is difficult to find merit in this proposal, and it is recommended that the application be disapproved." (A-R 73-74).

On September 23, 1968, the Regional Economist, who had also sat through the hearings and observed the demeanor of the witnesses wrote:

> "Essentially my original memorandum on this subject remains unchanged. The thorough cross-examination of the economist revealed that many of the statistics on income and populations growth for the Davie area were merely estimates and projections. They were given in the record as citable from the Broward County Planning Board. In fact, they had no source but were projections from earlier data. Since I concluded from the previous data that not sufficient growth had been demonstrated to warrant a new bank, the uncovering of the fact that the data is highly subject to question only strengthens the conclusion that economic growth has not been strong." (A-R 76).

The application was then referred to the Washington Office. Mr. T. M. Brezinski, the Director of the Bank Organization Division, was the first in Washington to consider the application. On December 10, 1968, Mr. Brezinski recommended against granting the application. (A-R 39).

On December 11, 1968, Mr. David G. Hayes, Department of Economic Banking & Research and the Senior Economist, refused to make a recommendation either way on the ground that "the available information is, in my opinion, insufficient for any recommendation." (A-R 39 and 75).

On the basis of the open and contested evidence about the past growth of Davie and the potential growth of Davie, the Citizen's Chain was obviously beaten. The Regional Economist had condemned the application after hearing:

> "In conclusion, the whole application rests upon a startling rate of growth projection for this relatively poor, relatively undeveloped area of Broward County. The past figures, as ably brought out in the hearing (See Exhibit P-3) simply do not support projections." (A-R 77).

The Regional Administrator on the basis of the evidence presented openly at the hearing had found:

> "The economic information submitted to support this application is misleading and has been slanted to gain approval." (A-R 74).

Accordingly, having failed in the sunshine, the Citizen's Chain on December 9, 1968, commenced a night-time campaign to bombard the Comptroller's Office secretly with written material calculated to plant the idea that people had suddenly started to swarm in on the sparsely populated area of the proposed bank site like a swarm of locusts.

On December 9, 1968, the Citizen's Chain secretly sent the Comptroller's Office "some newspaper clippings" supposedly concerning "the fast growing western part of Ft. Lauderdale". (A-R 30). On December 20, 1968, the Citizen's Chain secretly forwarded to the Comptroller's Office

> "two newspaper clippings regarding a proposed $400,000,000 complex that is to be built seven miles west of our proposed site. Our proposed bank would be the nearest bank to this complex. This is just another development in this fast growing area." (A-R 27).

On February 7, 1969, the Citizen's Chain secretly wrote

> "I am pleased to enclose a newspaper clipping regarding the construction in Broward County and I would especially ask you to take note of the figures for Davie. This is just further evidence that our judgment to select Davie is a good one for an affiliate bank location." (A-R 20).

On February 19, 1969, the Citizen's Chain secretly wrote to the Comptroller's Office

> "We are pleased to enclose another article regarding the Davie area which we think further points out the potential of the area where we propose to establish an affiliated bank." (A-R 17).

On March 7, 1969, the Citizen's Chain secretly phoned the Comptroller's Office to inquire about the status of the Davie application. (A-R 16). On March 10, 1969, the Citizen's Chain again secretly wrote the Comptroller's Office

> "We are enclosing two newspaper articles which further point out the continuing development of the fast growing area." (A-R 13)

On March 20, 1969, the Citizen's Chain again secretly wrote the Comptroller's Office enclosing a newspaper clipping headlined "Broward County Economy Is Outranking Rest Of the Nation". (A-R 10 and 11).

Although Sterling Bank had no idea that this secret propaganda campaign was in progress, the Deputy Comptroller on February 11, 1969, and March 24, 1969, secretly promised the Citizen's Chain

> "This material has been made a part of the record in connection with the application for a new National Bank at Davie, Florida, and will be carefully considered in our appraisal of the proposal." (A-R 19 and 9).

And consider this secret, ex parte material, the Deputy Comptroller did. On April 18, 1969, this Deputy Comptroller in stark contrast to market findings of five separate persons who had considered the application before on the basis of the visible evidence wrote

> "The record reflects that this market has a good potential and development is occurring at a steady pace." (A-R 3).

Whereas the Regional Economist on the basis of the open and aboveboard evidence found

> "The growth of Broward County has no relevance to the growth of this non-urban area. According to Table 2, the actual growth of Davie has been only 400 people in three years". (A-R 78),

the Deputy Comptroller on the basis of the barrage of secret, ex parte evidence that he secretly promised the Citizen's Chain he would consider wrote:

> "It (Davie) is a part of a constantly growing Broward County." (A-R 3).

He went on to write

> "It has not been shown that this new entry would not be in the public interest *** on balance, it is concluded that there is a basis to support a new bank in this market, particularly when consideration is given to the fact that it will be affiliated with three existing National Banks and it is recommended that the application be approved, with the title, 'Citizens National Bank of Davie'." (A-R 3).

The Comptroller himself approved the application on the same day as the Deputy Comptroller — April 18, 1969. (A-R 39).

On April 18, 1969, the Deputy Comptroller notified the Citizen's Chain

> "Preliminary approval granted application to organize National Bank of Davie, Florida, under the title 'Citizen's National Bank of Davie'. Letter follows." (A-R 1).

On May 29, 1969, Sterling brought suit against William B. Camp, Comptroller of the Currency, and the individuals seeking to organize the new bank for the Citizens Chain, seeking judicial review of the decision by the Comptroller granting preliminary approval of the organization of a new Citizens Chain bank in Davie, and seeking orders preserving the status quo until such time as judicial review was concluded. (A. 1-13).

On May 29, 1969, the matter was assigned to the Honorable Ted C. Cabot, United States District Judge for the Southern District of Florida, Miami Division, and presented to Judge Cabot on the prayer of the plaintiff for a temporary restraining order without notice — prohibiting the issuance of a final certificate of approval pending hearing on a temporary injunction.

While the case was pending in the Trial Court, the Citizen's National Bank of Davie opened in temporary headquarters, specifically a trailer. (R. 79).

Although Sterling attempted to take the depositions of the Comptroller and his Deputy Comptroller (the only two of the seven in the Comptroller's Office who purportedly recommended approval of the application), the Comptroller completely frustrated this. (R. 490-492).

On January 20, 1970, the Trial Judge on the motion of the Comptroller and the Citizen's Chain entered Summary Judgment against Sterling National Bank on the boilerplate ground that there was no genuine issue of material fact and that movants were entitled to a judgment as a matter of law. Although the Trial Court did not explain his judgment, he had earlier found that the Comptroller could legitimately consider secret, ex parte evidence and that the Comptroller is not obliged to explain his reasons for granting a national bank charter application. The Record, of course, revealed at the time of the Summary Judgment that both relevant and irrelevant secret, ex parte evidence on the critical issue of current and future growth of the market area (Davie) had been considered by the Comptroller's Office pursuant to secret promise of the Deputy Comptroller and that the Comptroller gave no reasons whatsoever for granting the charter.

On January 30, 1970, Sterling filed its Notice of Appeal which was given the Number 29,424, in the United States Court of Appeals for the Fifth Judicial Circuit of the United States.

The Fifth Circuit in an Opinion written by Judge Goldberg for a panel consisting of himself, Judge Brown and Judge Clark, affirmed the Trial Judge's conclusions that the Comptroller is not obliged to make findings or conclusions or a reasoned opinion in granting or denying a national bank charter and that the Comptroller may entertain and consider secret, ex parte material prejudicial to one side in granting or denying a national bank charter without affording the party prejudiced a chance to reply.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW DEALS WITH RECURRING PROBLEMS OF GREAT PUBLIC IMPORTANCE IN A MANNER THAT SERIOUSLY UNDERMINES OUR CONSTITUTIONAL FORM OF GOVERNMENT AND CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

The Comptroller grants and denies bank charters almost daily.

The decision below permits him without fear of the consequences to grant or deny a charter on the basis, for example, of rumor or whim and to keep it within his breast that he did so. To paraphrase Justice Douglas in his dissenting opinion in *Whitney National Bank v. Bank of New Orleans*, 379 U.S. 411, 428, 13 L.Ed.2d 398 (1965), the Fifth Circuit's opinion permits the Comptroller to be a free-wheeling dispenser of federal favors answerable to no one.

No public official should enjoy such power without this Court's specific approval if he is to have it; no Court but this Court is big enough and powerful enough by now to deny the Comptroller this power if he is not to have it.

Although decisions of the Comptroller granting or denying charters are technically reviewable in the Courts, such decisions in practice are not reviewable under the decision of the Fifth Circuit in this case.

The Fifth Circuit says on Page 7 of its Opinion that the Comptroller need give no reasons for his grant or denial of a charter. The murderous effect of this holding on meaningful judicial review is demonstrated by, among other things, the Court's virtual admission that it is unable to fault the Comptroller's decision because the Court has no idea why he did what he did. The Court says, "Although we cannot chart the subjectives of his discretionary decision, it was obviously based on a composite of many factors and much data". This statement would be equally true if the charter had been granted on caprice or for other improper reasons. Meaningful judicial review simply cannot be had when an administrative official such as the Comptroller can keep the reasons for his action to himself.

And this Court has so recognized.

In the first case of *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87 L.Ed. 626 (1942), the Supreme Court of the United States said, at 318 U.S. 94 and 95, and 87 L.Ed. 636 and 637:

> "Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us. That the scope of such review is narrowly circumscribed is beside the point. For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. If the action rests upon an administrative determination — an exercise of judgment in an area which Congress has entrusted to the agency — of course it must be set aside because the reviewing court might have made a different

determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. *In either event the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.* 'The administrative process will best be vindicated by clarity in its exercise.' Phelps Dodge Corp. v. National Labor Relations Bd. 313 US 177, 197, 85 L.Ed. 1271, 1284, 61 S.Ct. 845, 133 A.L.R. 1217.

****We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its power were those upon which its action can be sustained.*" (Emphasis added)

In the second case of *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 91 L.Ed. 1995 (1946), the Supreme Court of the United States reiterated its holding that an administrative order requiring a quasi-judicial determination cannot be sustained without a reasoned opinion and findings of fact. At 332 U.S. 196 and 197, and 91 L.Ed. 1999, the Court said:

"We also emphasized in our prior decision an important corollary of the foregoing rule. If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be com-

> pelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' United States v. Chicago, M.St.P. & P.R. Co. 294 U.S. 499, 511, 79 L.Ed. 1023, 1032, 55 S.Ct. 462. Applying this rule and its corollary, the Court was unable to sustain the Commission's original action . . . "

In *Panama Refining Co. v. Ryan*, 1935, 293 U.S. 388, 79 L.Ed. 446, the Supreme Court held that

> "due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends upon determinations of fact, those determinations must be shown." 293 U.S., at 432, 79 L.Ed., at 465.

As *Panama Refining Co., supra*, makes clear, this requirement of findings of fact and a reasoned opinion does not spring from the Administrative Procedure Act, but from the due process clause — in the case of the Federal agencies from the Fifth Amendment to the Constitution of the United States — in the case of the State agencies from the Fourteenth Amendment to the Constitution of the United States.

Although not so openly, the Fifth Circuit on Page 5 of its Opinion has also authorized the Comptroller to base his decision on secret, ex parte evidence which the party

prejudiced has never been given an opportunity to contradict; because 12 U.S.C.A. §27 authorizes the Comptroller "to base his decision on facts reported in the application and 'any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him . . . or *otherwise*. . . .' ".

The pervading danger of this holding has been best expressed by Judge Sobeloff in his dissenting opinion in *First National Bank of Smithfield v. Saxon*, 352 F.2d 267 (4th Cir. 1965) at pages 273 and 274:

> "The Comptroller's position strikes me as unfair, unwise and administratively unnecessary. History has given impressive evidence of the necessity for informed and objective regulation of our banking system. Questionable banking practices and excessive competition in the past led to disastrous results during the Great Depression. By affording objecting banks an adequate opportunity to be heard the Comptroller receives the benefit of a report suggesting reasons why the particular application should not be granted. The self-interest of the complainant may thus serve the public interest by raising considerations that might otherwise never come to light before the Comptroller. Thus, in presenting its own position, the objecting bank is also arguing that of the community which has a vital interest in the solvency of its local banks. The bank can perform this useful function only if it is allowed to know the supporting data presented to the Comptroller by the applicant. The plaintiff bank is acutely interested in the competition threatened

> by Eastern's application for permission to establish a branch bank in Smithfield, North Carolina. Rightly, I think, the majority holds that this interest is sufficient to entitle the Smithfield bank to appeal from the Comptroller's decision granting the application. Smithfield contends, however, that this right of appeal is meaningless unless it has previously been given an *effective* chance to be heard before the Comptroller reaches his final decision on the merits of the application. With this contention I agree, and would hold that such an opportunity, if requested, is a prerequisite to a valid decision on the part of the Comptroller. The right of the plaintiff to appear is of little worth to it if there is no disclosure of the pertinent data *and if the Comptroller may make up his mind in a private hugger-mugger with the applicant.*"

The Fifth Circuit's decision that the Comptroller may consider secret, ex parte evidence that the party prejudiced has never had an opportunity to contradict also conflicts with this Court's decision in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970). In that case, this Court held that the minimum requirements of "rudimentary due process" must be afforded to a welfare recipient. This Court said:

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E.G., ICC v. Louisville & N.R.R. Co., 227 U.S. 88, 93-94 (1913); Willner v. Committee on Character & Fitness,

373 U.S. 96, 103-104 (1963). What we said in Greene v. McElroy, 360 U.S. 474, 496-497 (1959), is particularly pertinent here: 'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurors or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . . but also in all types of cases where administrative . . . . actions were under scrutiny.' " 38 LW 4227, 25 L.Ed.2d 300.

The Comptroller, in reaching this "important decision" against Sterling, in part on the basis of secret *ex parte* information, violated even the minimum standards of rudimentary due process.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Fifth Circuit.

Respectfully submitted,

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By _____
HUGO L. BLACK, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of November, 1970, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to the following attorneys of record:

Hon. Robert W. Rust, Esq.,
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and
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I FURTHER CERTIFY that all parties required to be served have been served.

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By _____
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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. _____

STERLING NATIONAL BANK OF DAVIE,
Petitioner,

vs.

WILLIAM B. CAMP, Comptroller of the Currency, ET AL.,
Respondents.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27988

STERLING NATIONAL BANK OF DAVIE,
Plaintiff-Appellant,

versus

WILLIAM B. CAMP,
Comptroller of the Currency, ET AL,
Defendants-Appellees.

No. 29424

STERLING NATIONAL BANK OF DAVIE,
Plaintiff-Appellant,

versus

WILLIAM B. CAMP,
Comptroller of the Currency, ET AL,
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Florida

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(August 27, 1970)

Before BROWN, Chief Judge, and GOLDBERG and CLARK, Circuit Judges.

GOLDBERG, Circuit Judge: In this bank charter contest we decline the parties' insistent invitation to resolve a jorum of preliminary issues. Instead, we assume but do not decide that Sterling Bank has standing to raise the issues here involved and proceed directly to the heart of the matter — the validity of the contested bank charter.

The present controversy began in 1968 when a group of individuals sought a charter from the Comptroller of the Currency for a new national bank in Davie, Florida. The Sterling National Bank of Davie protested the application. Hearings were held, and both the proponents and opponents of the new bank presented evidence regarding the propriety of chartering a new bank in Davie. Although several of his subordinates recommended that the charter not be issued, the Comptroller eventually gave preliminary approval for the new charter.

The Sterling Bank, upon learning of this action by the Comptroller, filed this suit seeking to have the charter grant set aside. Sterling asked for various preliminary orders which were denied by the district court, and an interlocutory appeal resulted. Before the matters raised in the interlocutory appeal could be resolved by this court, the district court, upholding the issuance of the charter, granted summary judgment against the plaintiff. Sterling Bank immediately appealed, and this court ordered the two appeals consolidated. Since time has been the solvent of most of the preliminary issues, we relegate to a deserved limbo the whys and wherefores of the preliminary sparring and consider only the main issue — whether or not the Comptroller was authorized to grant the new charter. Agreeing with the district court's holding that the Comptroller acted within his authority, we affirm the decision of that court.

The statutory genesis for chartering a national bank is found in the National Banking Act, 12 U.S.C.A. § 21 *et seq.* The Act authorizes the Comptroller to grant new certificates of authority to commence banking in the following manner:

> "If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter." 12 U.S.C.A. § 27.

It has always been recognized that this legislation confers vast discretion on the Comptroller to approve or disapprove a new charter application. *Warren Bank v. Camp*, 6 Cir. 1968, 396 F.2d 52; *Webster Groves Trust Company v. Saxon*, 8 Cir. 1966, 370 F.2d 381; *see Ramapo Bank v. Camp*, 3 Cir. 1970, 425 F.2d 333; *Federal Home Loan Bank Board v. Rowe*, D.C. Cir. 1960, 284 F.2d 274.

As a result of the wide discretion vested in the Comptroller, every court which has considered the matter has concluded that judicial review is limited to determining whether or not the action of the Comptroller was arbitrary, capricious, an abuse of discretion, or otherwise not in accord with the law. *Ramapo Bank v. Camp, supra; Warren Bank v. Camp, supra; Citizens Bank of Hattiesburg v. Camp*, 5 Cir. 1968, 387 F.2d 375, *cert. denied*, 391 U.S. 904; *Webster Groves Trust Co. v. Saxon, supra.*

Evaluating the Comptroller's action in this case, we find not the slightest indication that he overstepped his authority or acted capriciously and arbitrarily. With respect to the question of whether or not there was a reasonable case on the merits for approving a new bank, the district court stated that "the administrative file is replete with evidence which would support either view." We agree. The Comptroller decided that the evidence supported the necessity of the new bank. We are not free to reverse the Comptroller's exercise of discretion and substitute our view of the merits for his. *Webster Groves Trust Co. v. Saxon, supra.* The administrative file plainly shows that the charter grant involved here was not made arbitrarily, capriciously, or in violation of the law. The grant must therefore be upheld. *Citizens Bank of Hattiesburg v. Camp, supra; Webster Groves Trust Co. v. Saxon, supra.*

Sterling Bank claims, however, that despite the evidence supporting the Comptroller's action, his award was unlawful because (1) he received ex parte secret information from the charter applicants, and (2) he did not accompany his award with a written opinion stating the reasons for his action. Both contentions are without merit.

Sterling Bank's first argument, that the Comptroller acted unlawfully by considering evidence obtained ex parte from the applicants, is nothing more than another way of contending that the Comptroller must obtain his information from a formal adversary hearing before he approves or disapproves a new bank application. This contention has been completely rejected in cases involving both new bank charters and branch charters. *Ramapo Bank v. Camp, supra; Warren Bank v. Camp, supra; Citizens Bank of Hattiesburg v. Camp, supra; Webster Groves Co. v. Saxon, supra; First National Bank of Smithfield, North Carolina v. Saxon*, 4 Cir. 1965, 352 F.2d 267, *aff'd.* 385 U.S. 252. In rejecting the contention that the Comptroller must always hold an adversary hearing, the courts have most often relied on the wording of the National Banking Act which authorizes the Comptroller to base his decision on facts reported in the application and "any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him . . . *or otherwise* . . . ." 12 U.S.C.A. § 27 (emphasis added).

The wording of the statute clearly authorizes the Comptroller to obtain his facts in a variety of ways. Since no formal adversary hearing is required and the Comptroller is authorized to obtain information by special commission "or otherwise," it is obvious that the Comptroller committed no unlawful action when he accepted and perhaps considered information sent to his office by some of the applicants, even though this was done without the knowledge of those opposing the charter.

Moreover, in our view some of the same considerations which led Congress to exempt the Comptroller from the necessity of holding a formal adversary hearing also excuse

him from filing a written opinion expressing his reasons for granting or denying an application. In *Webster Groves Trust Co. v. Saxon*, *supra*, the court explained:

> "The very nature of the decision required by the Comptroller indicates that a formal adversary type hearing would be of little benefit to him in the discharge of his discretionary powers. There is the further factor present that if bank applicants were subjected to severe public cross-examination, public presentation of unfavorable evidence and were forced to disclose their future plans and programs to competitors, public confidence in the banking system could be adversely affected." 370 F.2d at 385.

Accord, *Federal Home Loan Bank Board v. Rowe*, *supra*. See also *Warren Bank v. Camp*, *supra*.

The very considerations which make it undesirable to subject applicants to public cross-examination make it equally undesirable to compel the Comptroller to publish an opinion concerning his reasons for granting or denying a charter. The damage to public confidence would be the same no matter which way the confidential information became public. The statute clearly does not require that the Comptroller support his decision with a written opinion, and we think it would be ill-advised for this court to impose a requirement which Congress has not seen fit to demand. We conclude, therefore, that there was nothing unlawful in the Comptroller's action in granting the charter without a written opinion.

In sum, Sterling Bank was given a full and fair hearing to express its opposition to the new charter. The Comptroller decided against its position. Although we cannot chart the subjectives of his discretionary decision, it was obviously based on a composite of many factors and much data. To say that one fact was erroneous and that another fact was askew is not to infest the Comptroller's exercise of discretion with the scent of arbitrariness or capriciousness sufficient to set aside his decision. These are words of pejoration and must be supported by factual muscularity. Hypothets of error will not suffice. Here such factual muscularity is lacking, and as a result we cannot fault the Comptroller's decision. We find, therefore, that the charter for the new bank in Davie, Florida, is valid and should not be set aside by this court. In No. 27,988 the appeal is DISMISSED. In No. 29,424 the judgment of the district court is AFFIRMED.